RECORD AND BRIEF

Supreme Court, U.S.
FILED
JUL 14 2016
OFFICE OF THE CLERK

No. 15-1503

IN THE

Supreme Court of the United States

CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, CHARLES S. TURNER, LEVY ROUSE, & TIMOTHY CATLETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE PETITION PRESENTS IMPORTANT AND RECURRING *BRADY* ISSUES THAT WARRANT THIS COURT'S REVIEW. 7

A. *Brady* Protections Are Critical For Avoiding Wrongful Convictions. 7

B. High-Profile Violations Have Brought *Brady*-Related Issues To The Fore 11

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS CIRCUITS AND STATE HIGH COURTS THAT HAVE HELD THAT EVIDENCE OF ALTERNATIVE PERPETRATORS IS MATERIAL UNDER *BRADY*. 12

A. The Prevailing View Correctly Deems Plausible Alternative-Perpetrator Evidence Material Absent Strong Objective Evidence Of Guilt. 13

B. The D.C. Court Of Appeals Stands Alone In Allowing Suppression Of Alternative-Perpetrator Evidence Without Objective Evidence Of Guilt. 15

III. THE D.C. COURT OF APPEALS'S CATEGORICAL REFUSAL TO CONSIDER POST-CONVICTION INFORMATION IN EVALUATING MATERIALITY CANNOT BE SQUARED WITH *BRADY*. 17

A. *Brady*'s Focus On Truth And Justice Supports Considering Post-Conviction Events That Show The Significance Of Evidence Withheld Pre-Trial. 18

B. Ignoring Post-Trial Events That Help Demonstrate The Materiality Of Pre-Trial Evidence Encourages Prosecutors To "Tack[] Too Close To The Wind." 23

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Banks v. Reynolds,
54 F.3d 1508 (10th Cir. 1995) 4, 13, 14, 22

Beuke v. Houk,
537 F.3d 618 (6th Cir. 2008) 4, 14

Brady v. Maryland,
373 U.S. 83 (1963) ..... *passim*

Canales v. Stephens,
765 F.3d 551 (5th Cir. 2014) 4, 13

Carillo v. Cnty. of Los Angeles,
798 F.3d 1210 (9th Cir. 2015) 13

Commonwealth v. Bussell,
226 S.W.3d 96 (Ky. 2007) 14

Floyd v. State,
902 So.2d 775 (Fla. 2005) 4, 14

State ex rel. Griffin v. Denney,
347 S.W.3d 73 (Mo. 2011) 22

Grube v. State,
995 P.2d 794 (Idaho 2000) 4, 15

Gumm v. Mitchell,
775 F.3d 345 (6th Cir. 2014) 4, 13, 14

Harrington v. State,
659 N.W.2d 509 (Iowa 2003) 4, 14, 22

Jarrell v. Balkcom,
735 F.2d 1242 (11th Cir. 1984) 4, 13

Kyles v. Whitley,
514 U.S. 419 (1995) ..... *passim*

Madrid v. Wilson,
590 F. App'x 773 (10th Cir. 2014) 15

Mazzan v. Warden,
993 P.2d 25 (Nev. 2000) 14

Miller v. Angliker,
848 F.2d 1312 (2d Cir. 1988) 4, 13

People v. Beaman,
890 N.E.2d 500 (Ill. 2008) 4, 14

In re Special Proceedings,
825 F.Supp.2d 203 (D.D.C. 2011) 11

Strickler v. Greene,
527 U.S. 263 (1999) 19

United States v. Agurs,
427 U.S. 97 (1976) ..... *passim*

United States v. Bagley,
473 U.S. 667 (1985) ..... *passim*

United States v. Jernigan,
492 F.3d 1050 (9th Cir. 2007) 4, 13, 21

United States v. Olsen,
737 F.3d 625 (9th Cir. 2013) 11, 23

Wearry v. Cain,
136 S. Ct. 1002 (2016) 17

Williams v. Ryan,
623 F.3d 1258 (9th Cir. 2010) 13, 14

Wood v. Bartholemew,
516 U.S. 1 (1995) 21, 22

Other Authorities

John H. Blume et al.,
Every Juror Wants a Story: Narrative Relevance, Third Party Guilt, and the Right to Present a Defense, 44 AM. CRIM. L. REV. 1069 (2007) 9

Daniel J. Capra,
Access to Exculpatory Evidence: Avoiding the Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984) 25

Dep't of Justice,
Press Release, *Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases* (Apr. 14, 2009). 11

Bennett L. Gershman,
Reflections on Brady v. Maryland, 47 S. TEX. L. REV. 685 (2006) 8

Government Misconduct,
INNOCENCE PROJECT OF MINNESOTA (July 14, 2016) 8

Lissa Griffin,
Innocence and the Suppression of Exculpatory Evidence by Prosecutors, in CONTROVERSIES IN INNOCENCE CASES IN AMERICA (Sarah Lucy Cooper ed. 2014) 8, 12

Jerry Watkins,
INNOCENCE PROJECT (July 14, 2016) 10

Peter A. Joy,
The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 WIS. L. REV. 399 (2006) 9

Kenneth Kagonyera,
INNOCENCE PROJECT (July 14, 2016) 10

James S. Liebman et al.,
Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 TEX. L. REV. 1839 (2000) 9

Daniel S. Medwed,
Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010) 23

Michael Morton,
INNOCENCE PROJECT (July 14, 2016) 10

N.Y.S. BAR ASS'N,
TASK FORCE ON WRONGFUL CONVICTIONS,
FINAL REPORT OF THE NEW YORK STATE
BAR ASSOCIATION'S TASK FORCE ON
WRONGFUL CONVICTIONS (2009) 8

Duff Wilson,
Hearing Ends in Disbarment For
Prosecutor in Duke Case, N.Y. TIMES,
June 17, 2007 11

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an affiliation of organizations from around the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove their innocence, and working to redress the causes of wrongful convictions. The sixty-seven current members of the Network represent hundreds of prisoners with innocence claims in all fifty states, the District of Columbia, and abroad.[2]

The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on lessons from cases in which innocent persons were convicted, the Network advocates study and reform designed to enhance the truth-seeking functions and procedures of the criminal justice system to ensure that future wrongful convictions are prevented.

The Innocence Network frequently files amicus briefs in cases raising important issues of criminal law, including the due process protections afforded by *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g.*,

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[1] *Amicus* timely notified all parties of its intention to file this brief, and their consent letters have been submitted to the Clerk. *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Mid-Atlantic Innocence Project, a member of the Innocence Network and co-counsel for a petitioner, has not made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The appendix lists the Network's members.

Smith v. Cain, No. 10-8145 (U.S. 2011); *Keith v. Ohio*, No. 09-1052 (U.S. 2010).

The Innocence Network submits this brief to emphasize the central role that the constitutional protections announced in *Brady* occupy in our criminal trial system, and the profound injustices that will result if the District of Columbia Court of Appeals's misinterpretation of the *Brady* rule is allowed to stand. The Innocence Network believes, based on its extensive experience with cases of wrongful conviction, that *Brady* obligations must be robust; in order to guarantee fair trials and secure justice, courts should encourage prosecutors to err on the side of disclosure when it comes to exculpatory evidence, and courts should consider all available evidence in evaluating whether confidence in a guilty verdict has been undermined.

SUMMARY OF ARGUMENT

Petitioners were convicted of the 1984 robbery, sodomy, and murder of Mrs. Catherine Fuller in Washington, D.C. After learning years later that prosecutors had failed to disclose valuable exculpatory evidence at their trial—including evidence pointing to two alternative perpetrators—petitioners sought relief under *Brady*. The court below denied post-conviction relief.

In doing so, the court below effectively eviscerated *Brady*'s protections by crafting a fundamentally different disclosure standard. It blessed the suppression of eyewitness testimony identifying plausible alternative perpetrators, despite widespread recognition that such evidence constitutes material, exculpatory evidence under *Brady*. In addition, rather than following this Court's balancing test for

materiality—which takes into account all available evidence bearing upon the significance of the withheld material—the court below adopted a bright-line rule that precludes consideration of post-conviction events. These rulings erroneously disregarded that the suppressed evidence would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

If left unchecked, the decision below threatens to end the *Brady*-mandated search for truth and justice. Other jurisdictions may follow the D.C. Court of Appeals's lead in disregarding powerful alternative-perpetrator evidence, resulting in inflexible standards squarely at odds with how *Brady* was designed to operate post-conviction. This Court should grant certiorari to ensure that the *Brady* rule is not undermined by categorical rules—like those imposed by the court below—with no basis in precedent and opposed to *Brady*'s fundamental policy.

I. This case presents the Court with an excellent opportunity to address important, recurring issues bearing upon the government's constitutional duty to disclose material, exculpatory evidence to defendants.

A. Studies—including those conducted by members of the Innocence Network—confirm what commonsense teaches: that *Brady* violations are strongly correlated with wrongful convictions. A *Brady* violation has especially severe impact on a defendant when the exculpatory material is evidence of an alternative perpetrator, as it was here; research shows such evidence is often crucial to a defendant's ability to present a complete narrative that could influence

a jury's deliberations on whether guilt has been proven beyond a reasonable doubt.

B. The time is ripe for this Court to again remind participants in the criminal justice system of the requirements of *Brady*. A recent string of egregious *Brady* violations threatens to erode public confidence in the criminal justice system. Because the great majority of prosecutors strive to abide by their *Brady* obligations, prosecutors and lower courts need this Court's clear guidance on how to apply *Brady*'s due process protections.

II. The D.C. Court of Appeals's interpretation of *Brady* conflicts with decisions of federal courts of appeals and state high courts across the country. Those courts have consistently held that suppressing evidence that plausibly implicates an alternative perpetrator is a classic *Brady* violation. *See, e.g.*, *Gumm v. Mitchell*, 775 F.3d 345, 364 (6th Cir. 2014); *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007) (en banc); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995); *Miller v. Angliker*, 848 F.2d 1312, 1322-23 (2d Cir. 1988); *Floyd v. State*, 902 So.2d 775, 785-86 (Fla. 2005); *People v. Beaman*, 890 N.E.2d 500, 511-14 (Ill. 2008); *Harrington v. State*, 659 N.W.2d 509, 525 (Iowa 2003); *see also Canales v. Stephens*, 765 F.3d 551, 575-76 (5th Cir. 2014); *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984).

Where courts have held that evidence of a plausible alternative perpetrator is nonetheless immaterial, it is in circumstances not present here—such as when the prosecution's case centers on inculpatory physical evidence or objective indicia of guilt. *See, e.g.*, *Beuke v. Houk*, 537 F.3d 618, 634-36 (6th Cir. 2008); *Grube v. State*, 995 P.2d 794, 799 (Idaho 2000). That holistic approach is consistent with this

Court's precedents—the materiality of withheld information "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

The decision below clearly deviates from these precedents. The prosecutor withheld powerful evidence of *two* alternative perpetrators. And the case against petitioners—lacking in physical evidence or objective indicia of guilt—was admittedly "[n]ot a good one" and "easily could have gone the other way." Pet. 8 (citing record). To bring the District of Columbia in line with other jurisdictions, and in conformity with the correct *Brady* standard, this Court should grant review.

III. The D.C. Court of Appeals further diverged from *Brady* by flatly refusing to consider highly relevant post-conviction events when assessing whether the evidence suppressed pre-trial was material under the circumstances. The court's imposition of a bright-line rule admitting of no exceptions cannot be reconciled with this Court's precedents. The objectives of truth, justice, and fairness that animate *Brady* also mandate that a reviewing court take account of post-trial events that bear directly on the materiality of the suppressed evidence to the finding of guilt.

A. This Court has stressed that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U.S. at 110. Accordingly, the materiality analysis does not assess "the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87; the due process violation occurs at trial, when the jury begins deliberations without having heard about the withheld exculpato-

ry material or where it might lead. Consistent with *Brady*'s function as a truth-seeking rule designed to ensure "'that justice shall be done,'" the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record," *Agurs*, 427 U.S. 111-12, with "confidence" in the correctness of the verdict top of mind, *Kyles*, 514 U.S. at 439.

In undertaking that evaluation, courts must take into account how post-conviction information has cast new light on undisclosed evidence in the prosecutor's file. A fact viewed as immaterial at the time of trial may appear very different after post-conviction confessions, recantations, or DNA analysis, for example. Of course, the point is not that such post-conviction events were withheld before trial—they had not yet occurred—but that they bear directly on the materiality of evidence that *was* withheld pre-trial. A reviewing court that sticks its head in the sand and refuses to consider post-conviction events cannot fairly assess whether the undisclosed information in the prosecutor's file "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. The post-conviction information exposes the error in the government's pre-trial strategic gamble, and where—as here—that error is of constitutional magnitude, it must be reversible post-conviction.

B. The decision below strains confidence in the criminal justice system by eliminating any consequence of the government's failure to disclose quintessentially exculpatory evidence that may prove material. Time and again, this Court has counseled prudent prosecutors to err on the side of disclosing evidence. And this Court has invalidated convictions—irrespective of the prosecutor's intentions or

subjective knowledge at the time of trial—where there was a "concern that the suppressed evidence might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104, 110.

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Here, the shaky case against the defendants, the gravity of the suppressed evidence of alternative perpetrators, and the power of the post-conviction information in confirming the significance of the withheld facts irreparably undermine confidence in *this* verdict.

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT AND RECURRING *BRADY* ISSUES THAT WARRANT THIS COURT'S REVIEW.

The job of prosecutor has traditionally attracted diligent public servants who pursue justice by following their *Brady* obligations. They seek to uncover truth and to ensure that trials are fair and wrongful convictions are avoided. But *Brady* violations do occur, and they are a leading cause of convictions of the innocent. The petition presents an excellent vehicle for this Court to clarify how *Brady*'s promise of justice is to be secured.

A. *Brady* Protections Are Critical For Avoiding Wrongful Convictions.

It is not hyperbole to say that our adversarial system of criminal justice depends on the effective functioning of the *Brady* doctrine. Strict compliance

with *Brady*'s disclosure rule helps resolve the unavoidable information imbalance between government investigators and criminal defendants, thereby ensuring that an accused is afforded a fair opportunity to present a complete defense to the jury. *See Brady*, 373 U.S. at 87. When the government withholds material, exculpatory evidence—whether knowingly or inadvertently—it risks securing the conviction of innocent defendants by denying them fair trials. Given the large number of prosecutions nationwide, it only takes *Brady* violations in a small proportion to infect a great many cases.

Studies by Innocence Network members have revealed an undeniable correlation between *Brady* violations and wrongful convictions. *See, e.g.*, *Government Misconduct*, INNOCENCE PROJECT OF MINNESOTA, http://ipmn.org/causes-and-remedies-of-wrongful-convictions/government-misconduct (last visited July 14, 2016) (finding *Brady* violations in 37% of 74 wrongful convictions). The Innocence Network is not alone in identifying and quantifying this alarming correlation. *See, e.g.*, Lissa Griffin, *Innocence and the Suppression of Exculpatory Evidence by Prosecutors*, in CONTROVERSIES IN INNOCENCE CASES IN AMERICA 79 (Sarah Lucy Cooper ed. 2014) (noting that the second-most "frequent basis for wrongful convictions has been prosecutorial suppression of exculpatory evidence"); N.Y.S. BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 19, 24-26 (2009) (identifying *Brady* violations as among the causes of over 50% of fifty-three wrongful convictions and compiling examples of violations); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 & n.8 (2006) (cataloging

sources finding that "hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence."); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 n.20, 425 n.134 (2006) (citing studies linking *Brady* violations to wrongful convictions); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850, 1864 n.79 (2000) (finding *Brady* violations were one of "the two most common errors" leading to reversals of death sentences, accounting for almost one-fifth of such reversals).

This correlation is not surprising. It has long been recognized that withholding exculpatory evidence may impair the "preparation or presentation of the defendant's case." *United States v. Bagley*, 473 U.S. 667, 683 (1985). This information disparity is especially damaging to the defense when the undisclosed evidence relates to an alternative perpetrator. Studies analyzing juror behavior show that jurors are more likely to credit a defendant's version of events if presented with a complete and coherent narrative—including, in particular, evidence of who other than the defendant may have committed the crime—to counter the narrative presented by the prosecution. *See* John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt, and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087-91 (2007).

Brady violations upend real lives. A few examples of *Brady*'s power illustrate the risks of diluting the doctrine.

- Michael Morton served over twenty-four years in prison for murdering his wife before being exonerated. At his trial, prosecutors withheld critical exculpatory evidence, including his son's eyewitness account of the crime, his neighbors' statements that on the day of the crime another man had parked behind the Mortons' home and walked into the woods nearby, and that someone in another city attempted to use Mrs. Morton's credit card after her murder. The withheld evidence pointed to a man who, after Mr. Morton's conviction, committed another murder very similar to Mrs. Morton's. *Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/michael-morton (last visited July 14, 2016).

- Jerry Watkins served thirteen years for abducting, raping, and murdering an eleven-year-old girl before being exonerated. He was convicted although no physical evidence connected him to the crime. After trial, he learned that prosecutors had investigated other suspects and had withheld an eyewitness's account of the abduction that pointed to a different suspect. *Jerry Watkins*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/jerry-watkins (last visited July 14, 2016).

- Kenneth Kagonyera served ten years in prison for a murder he did not commit. During the investigation, physical evidence collected from the crime scene was submitted for pre-trial DNA testing. The results of those tests exculpated Kagonyera. But the prosecution did not disclose those test results despite specific requests for them. *Kenneth Kagonyera*, INNOCENCE PROJECT,

http://www.innocenceproject.org/cases/kenneth-kagonyera (last visited July 14, 2016).

These are but three stories of how *Brady* violations lead to profound consequences. They demonstrate that wrongful convictions can result when there is no inculpatory physical evidence, and when a defendant is unable to offer evidence of an alternative perpetrator. When that inability stems from prosecutors withholding exculpatory evidence, the resulting verdict offends the Constitution.

B. High-Profile Violations Have Brought *Brady*-Related Issues To The Fore.

In the last decade, several instances of prosecutors failing to satisfy their disclosure obligations have garnered significant media attention. For example, in Washington, D.C., prosecutors committed serious *Brady* violations amounting to the "systematic concealment of significant exculpatory evidence" in the case against Senator Ted Stevens. *In re Special Proceedings*, 825 F.Supp.2d 203, 204-05 (D.D.C. 2011). The Attorney General responded by ordering additional training to ensure that federal prosecutors "understand fully their discovery obligations." Dep't of Justice, Press Release, *Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases* (Apr. 14, 2009). In North Carolina, a district attorney was disbarred after failing to disclose exculpatory DNA evidence in the notorious prosecution of members of the Duke University lacrosse team. *See* Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at A21. Meanwhile, lesser-known (but significant) *Brady* violations have been piling up across the country. *See United States v. Olsen*, 737 F.3d 625, 631-32 (9th Cir. 2013)

(Kozinski, J., dissenting from denial of rehearing *en banc*) (collecting cases "bear[ing] testament to this unsettling trend" of *Brady* violations); Griffin, *supra*, at 83 & n.89 (same). Such errors erode public confidence in the capacity of the adversarial system to uncover the truth.

This Court should address this significant issue, resolve the important questions presented in the petition, and correct the D.C. Court of Appeals's misinterpretation of *Brady* before it proliferates.

II. The Decision Below Conflicts With Numerous Circuits And State High Courts That Have Held That Evidence Of Alternative Perpetrators Is Material Under *Brady*.

Suppression of exculpatory information is material under *Brady* when disclosure of "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

For decades, federal courts of appeals and state high courts applying this standard have held that evidence of a plausible alternative perpetrator qualifies as material unless there is strong objective evidence of a defendant's guilt. Yet the D.C. Court of Appeals held otherwise. It excused the suppression of admittedly exculpatory evidence the government had *before the trial*—despite a record bereft of physical evidence or reliable indicia of petitioners' guilt—based on bald speculation about why the jury would have disregarded the evidence. This aberrant ruling, on a critical and oft-litigated aspect of *Brady*, merits review.

A. The Prevailing View Correctly Deems Plausible Alternative-Perpetrator Evidence Material Absent Strong Objective Evidence Of Guilt.

Six federal courts of appeals have held that *Brady* requires disclosure of alternative-perpetrator evidence. For example, the Ninth Circuit, sitting *en banc*, held that "[w]ithholding knowledge of a second suspect conflicts with [this Court's] directive that 'the criminal trial, as distinct from the prosecutor's private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.'" *Jernigan*, 492 F.3d at 1056-57 (quoting *Kyles*, 514 U.S. at 440); *see also Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) ("[E]vidence suggesting an alternate perpetrator is 'classic *Brady* material'"). In the Ninth Circuit's view, this rule was so ingrained as to be "clearly established" one year prior to petitioners' trial--"[a]ny reasonable police officer in 1984 would have understood that evidence potentially inculpating another person fell within *Brady*'s scope." *Carillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1226 (9th Cir. 2015). The Sixth Circuit has also been emphatic about *Brady*'s reach. It has held that, "[o]n its face, the nondisclosure of the identities of [alternative] suspects" constitutes "an egregious breach of the state's *Brady* obligations." *Gumm*, 775 F.3d at 364 (collecting cases). Decisions in the Second, Fifth, Tenth, and Eleventh Circuits are in accord. *See, e.g.*, *Canales*, 765 F.3d at 575-76; *Banks*, 54 F.3d at 1517-18; *Miller*, 848 F.2d at 1322-23; *Jarrell*, 735 F.2d at 1258. No federal court of appeals has held otherwise.

So, too, state high courts across the country have held that withholding alternative-perpetrator evi-

dence violates the Constitution's fair-trial guarantee that *Brady* is designed to protect. These courts have explained that alternative-suspect evidence is "'bedrock *Brady* material'" which, if suppressed, justifies "'ordering new trials.'" *Floyd*, 902 So.2d at 783-87 (citations omitted); *see also, e.g.*, *Harrington*, 659 N.W.2d at 524-25 (concluding that alternative-suspect evidence would have been "the centerpiece of a consistent theme that the State was prosecuting the wrong person"); *Commonwealth v. Bussell*, 226 S.W.3d 96, 102 (Ky. 2007). This understanding comports with the facts of *Brady* itself, where this Court adopted the Maryland Court of Appeals's holding that suppressing evidence inculpating an alternative perpetrator violated due process. 373 U.S. at 85-87.

Significantly, at both the federal and state levels, courts have explained that alternative-perpetrator evidence is especially important in close cases—such as when inculpatory evidence is weak, or the jury struggles to convict. *See, e.g.*, *Banks*, 54 F.3d at 1521; *Beaman*, 890 N.E.2d at 511-14; *Mazzan v. Warden*, 993 P.2d 25, 38-41 (Nev. 2000). Such evidence is more likely to be material where, for example, there is little or no physical evidence of defendant's guilt. *See, e.g.*, *Gumm*, 775 F.3d at 374; *Williams*, 623 F.3d at 1266; *Floyd*, 902 So.2d at 785-86.

By contrast, in the rare cases in which courts have accepted the government's withholding of plausible alternative-perpetrator evidence, there has often been physical evidence or other strong objective indicia of the defendant's guilt. For example, undisclosed alternative-perpetrator evidence has been deemed immaterial when fingerprint and forensic evidence constituted "substantial objective evidence" of the defendant's guilt. *Beuke*, 537 F.3d at 635-36;

see also Madrid v. Wilson, 590 F. App'x 773, 779 (10th Cir. 2014) ("tenuous evidence" of a "vague description of a possible alternative suspect" was immaterial given "substantial evidence" of defendant's guilt); *Grube*, 995 P.2d at 799 (highlighting physical evidence inculpating defendant).

These decisions make sense in light of *Brady*'s overriding interest in fair trials. A trial is unlikely to be fair if information implicating plausible alternative suspects is withheld. And the disclosure of such information is likely to fundamentally change the course of a trial. In cases lacking inculpatory physical evidence, justice suffers if plausible alternative-perpetrator evidence is considered immaterial to the jury's deliberations.

B. The D.C. Court Of Appeals Stands Alone In Allowing Suppression Of Alternative-Perpetrator Evidence Without Objective Evidence Of Guilt.

In direct contravention of this substantial weight of authority, the D.C. Court of Appeals held that the suppression of evidence pointing to *two* plausible alternative perpetrators was immaterial although no physical evidence inculpated petitioners.

As petitioners recount (Pet. 6-8), the government's case against them was founded upon flimsy circumstantial evidence. The testimony of the prosecution's star witnesses was "riddled with inconsistencies," and corroborating witnesses had "significant credibility problems." Pet. 7. What little physical evidence existed did not inculpate the petitioners, and it was inconsistent with the government's group-attack theory of the case. Petitioners' capacity to mount a defense was irreparably harmed by their

inability to present an alternative-perpetrator narrative. Pet. 8-9. Because prosecutors did not disclose their knowledge of two other suspected assailants, petitioners were deprived of the opportunity to credibly refute the government's theory with evidence that someone else may have committed the crime. Even lacking such information, the jury struggled; it deliberated for an entire week, initially deadlocking over two defendants, acquitting two others, and taking numerous votes to resolve the case. *Ibid.* In light of the fine distinctions between defendants that the jury was obviously making—despite the government's group-attack theory—evidence of an alternative perpetrator would plainly have been material to the jury's deliberations.

Against this backdrop of equivocal evidence, the verdict could not be deemed worthy of confidence after revelations, years later, that the government suppressed information about two different alternative suspects. *See* Pet. 10-12.

- Just three weeks after Mrs. Fuller's murder, a witness told investigators that on the day of the murder James Blue had pulled a woman into an alley and beat and killed her. Blue, who had previously committed crimes with similar characteristics, was released from prison the very day Mrs. Fuller was killed. Shortly before trial, Blue murdered the individual who had implicated him in the Fuller murder.

- Multiple eyewitnesses saw James McMillan fleeing the alley where the crime occurred—with an object hidden under his coat—when the police arrived. Prosecutors were also aware that McMil-

lan had recently robbed and assaulted two other middle-aged women nearby.

It is fanciful to say with confidence that the trial would have unfolded the same way if the government had complied with its *Brady* obligations. "Even if the jury—armed with all of this new evidence—*could* have voted to convict [petitioners]," this Court should "have 'no confidence that it *would* have done so.'" *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam) (citation omitted).

Therefore, this Court should grant certiorari. It should reject the D.C. Court of Appeals's aberrational holding that evidence about plausible alternative perpetrators is immaterial even where there is no objective evidence of a defendant's guilt. This Court should give clear guidance to lower courts that alternative-perpetrator evidence is material under *Brady* unless outweighed by substantial objective evidence inculpating a defendant.[3]

III. THE D.C. COURT OF APPEALS'S CATEGORICAL REFUSAL TO CONSIDER POST-CONVICTION INFORMATION IN EVALUATING MATERIALITY CANNOT BE SQUARED WITH *BRADY*.

Two months after James McMillan was released from prison in 1992, he assaulted, sodomized, and murdered another woman in an alley just three blocks from where Mrs. Fuller was found. Pet. 11. Sexual assaults with these characteristics occur in "considerably less than one percent of homicide cas-

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[3] For the foregoing reasons, the Court should also grant the companion petition for certiorari in *Overton v. United States*, No. 15-1504.

es," which raises the obvious question whether McMillan was singly guilty of both heinous acts, given the high rates of recidivism widely reported in scientific literature. *Ibid.* These post-trial events—shockingly similar to the crime for which petitioners were convicted—confirmed the materiality of the suppressed evidence pointing to McMillan as a suspect in Mrs. Fuller's murder.

Yet the D.C. Court of Appeals disregarded this information. It held that post-conviction events are "not relevant to whether the government violated its *Brady* obligations" and have "no bearing on the question of the materiality of any evidence that the government actually did withhold from the defense." Pet. App. 36a. That bright-line rule is in direct conflict with the holistic evaluation of all information available to the reviewing court that *Brady* demands.[4] It also tempts the government—contrary to this Court's directive—to sit on pre-trial exculpatory information long enough to insulate a questionable verdict against a post-conviction challenge.

A. *Brady*'s Focus On Truth And Justice Supports Considering Post-Conviction Events That Show The Significance Of Evidence Withheld Pre-Trial.

The overarching purpose of *Brady* is "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. Likewise, "[t]he proper standard of materiality must reflect our overriding concern with

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[4] The court below was wrong to suggest that *Brady* may be an inappropriate vehicle for relief here. *See* Pet. App. 37a. If prosecutors withheld material, exculpatory evidence, that alone entitles petitioners to a new trial.

the justice of the finding of guilt." *Agurs*, 427 U.S. at 112.

To serve that purpose, *Brady* holds prosecutors to a strict standard, consistent with their "special role" in the "search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *Brady* protections are therefore among the most important tools in preventing wrongful convictions. Accordingly, *Brady*'s "constitutional obligation" is not "measured by the moral culpability, or the willfulness, of the prosecutor." *Agurs*, 427 U.S. at 110. *Brady* violations occur "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, because "an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler*, 527 U.S. at 288. It is "the character of the *evidence*, not the character of the *prosecutor*," that matters. *Agurs*, 427 U.S. at 110 (emphases added).

The truth-and-justice-seeking function that animates *Brady* would be severely jeopardized if a reviewing court is not able to take into account *all* of the facts available at the time the conviction is reviewed—including facts arising post-trial—when determining the materiality of withheld information. Any other rule leaves highly probative information regarding "the justice of the finding of guilt" outside the reviewing court's evaluation. *Agurs*, 427 U.S. at 117.

The wrongful conviction of Michael Morton, noted earlier, is a prime example of the importance of considering post-trial information. Mr. Morton was convicted of murdering his wife by beating her to

death in their bed. There were substantial *Brady* violations in his prosecution, including suppression of neighbors' statements about an alternative perpetrator. Critical to understanding the importance of the exculpatory alternative-perpetrator evidence withheld from Mr. Morton is information that came to light post-trial: Years after Mr. Morton's sentence began, a DNA-test of physical evidence—rather than matching Mr. Morton—instead matched someone who was serving a sentence for a similar murder committed two years after Mrs. Morton's death.

Here, the identity of an alternative perpetrator was known to the prosecution before trial but withheld from petitioners. Post-conviction, that very individual later committed a crime displaying hallmark characteristics of the crime for which the petitioners were convicted. Under these circumstances, a reviewing court must be able to consider information about that post-conviction crime in evaluating whether the pre-trial suppression of information about the person who committed it undermines confidence in the correctness of the guilty verdict. It is not for the reviewing court to weigh the effect counsel's use of such information would have had on the jury (whether, for example, counsel could have examined the alternative perpetrator about his criminal history, or questioned the thoroughness of the government's investigation). This Court has emphasized that *Brady* analysis is not a harmless-error test, *Kyles*, 514 U.S. at 435-36, an exhortation the court below flatly ignored when it assessed whether disclosure of the suppressed identity "would have led the jury to doubt *virtually everything*" about the government's case. Pet. App. 54a. Rather, the due pro-

cess violation occurs when the jury deliberates without having had an opportunity to consider the import of the suppressed information. That is when the unfairness of the suppression is realized.

Allowing a reviewing court to consider post-conviction information as part of its materiality inquiry is consistent with this Court's precedents. This Court has directed a reviewing court to assess materiality "in light of the totality of the circumstances." *Bagley*, 473 U.S. at 683; *see also Agurs*, 427 U.S. at 112 & n.21; *Jernigan*, 492 F.3d at 1054 ("[J]udges must 'undertake a careful, balanced evaluation of the nature and strength'" of the withheld exculpatory and available inculpatory information (citation omitted)). It has also recognized the "significant practical difference" between the prosecutor's pre-trial decision to disclose and the judge's post-trial review of that decision. *Agurs*, 427 U.S. at 108. That difference explains why the judge's holistic review should consider information that, although not available to the prosecutor at trial, illuminates the importance of the evidence that the prosecutor *did* possess but did *not* disclose.

This Court has condoned the use of post-trial events to confirm whether undisclosed evidence was material. In *Wood v. Bartholomew*, this Court summarily reversed the circuit court's conclusion that withheld information was material, because the circuit court's analysis "disregarded[] the view of respondent's own trial counsel" that had only been expressed during post-conviction testimony. 516 U.S. 1, 7-8 (1995) (per curiam). This Court noted that the post-trial information represented the "best possible proof" of whether the suppression was material.

Ibid. Other courts have similarly considered post-conviction events as part of *Brady*'s materiality analysis. *See, e.g.*, *Banks*, 54 F.3d at 1520 (evaluating materiality of withheld alternative-perpetrator evidence by considering counsel's post-conviction testimony about how case would have unfolded differently but for suppression); *Harrington*, 659 N.W.2d at 516 (finding post-conviction information "gives context" to the "discussion of the materiality" of withheld evidence); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77-79 (Mo. 2011) (en banc) ("[O]n an alleged *Brady* violation, this Court considers all available evidence uncovered following the trial," including post-trial recantation and third-party confession).

Evaluating materiality in light of post-trial events is also consonant with this Court's history of calibrating a prosecutor's *Brady* obligations to the need to ensure fair trials. In *Agurs*, this Court *presumed*, after the fact, that conscientious prosecutors would recognize material, exculpatory evidence, even if the prosecutor had "actually overlooked it" at the time. 427 U.S. at 110. Later, the Court "disavowed any difference between exculpatory and impeachment evidence," and "abandoned the distinction" between failing to comply with a request for *Brady* material and failing to provide that material voluntarily. *Kyles*, 514 U.S. at 433 (discussing *Bagley*). The Court subsequently imposed a duty on prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf." *Id.* at 437. In each instance, the Court implemented *Brady* without passing judgment on prosecutors. Rather,

the Court aimed to reinforce the fair-trial right embodied in the Due Process Clause.

B. Ignoring Post-Trial Events That Help Demonstrate The Materiality Of Pre-Trial Evidence Encourages Prosecutors To "Tack[] Too Close To The Wind."

This Court has advised against discouraging "[t]he prudence of the careful prosecutor." *Id.* at 440. The decision below does exactly that. It incentivizes prosecutors to amplify their chances of obtaining convictions by withholding exculpatory evidence and gambling that there will be no consequences post-conviction for failing to disclose evidence that, in hindsight, would have mattered to the jury. "By raising the materiality bar impossibly high, the panel invites prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violation as immaterial." *Olsen*, 737 F.3d at 632.

To be sure, a prosecutor's pre-trial assessment of materiality is inherently uncertain. "[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete." *Agurs*, 427 U.S. at 108. As a result, a prosecutor will always "be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 438-39; *see also* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1558 (2010) (noting prosecutors must make "an artificial, prospective assessment about how particular items of evidence fit within the jigsaw puzzle of a possible

trial"). Even the most conscientious prosecutor runs the risk of having a case unfold unexpectedly—which might portend a *Brady* violation—after electing to withhold certain evidence.

That reality counsels for prudent prosecutors to err on the side of pre-trial disclosure to avoid the prospect of a due process violation down the road. *See Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 108. Disclosing additional information enhances justice. Moreover, robust disclosure obviates the need for a new trial, after evidence has degraded and memories have faded, and avoids the heavy costs of a collateral challenge. In short, a rule encouraging pre-trial disclosure in close cases is the best way to minimize the frequency of future *Brady* challenges and foster finality.

A rule that considers how post-trial information might bear on the significance of suppressed pre-trial facts is a no-lose proposition. Either the information will reinforce that the trial was fair, or it will justify vacating a verdict that is unworthy of confidence—how could considering more information do otherwise? And rejecting the D.C. Court of Appeals's categorical prohibition on considering the implications of post-trial events will not burden prosecutors or the justice system.[5] To the contrary, a far greater toll is exacted by ignoring *Brady*'s policy and increasing the potential that a wrongful conviction will go uncorrected. In this case, it took twenty-six years for petitioners to learn the pre-trial information that was

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[5] Some jurisdictions, such as Texas (after the Morton case), have adopted an open-file policy, which is strong circumstantial evidence that prophylactic disclosure is not unduly burdensome.

known to the government. So long as *Brady*'s materiality requirement remains in place, the state's strong interest in finality will be satisfied no matter how long it takes for petitioners to receive the new, fair trial they are guaranteed under the Constitution. *Bagley*, 473 U.S. at 675 n.7; *accord* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 414 (1984).

CONCLUSION

For the reasons above and in the petition, the writ of certiorari should be granted and the judgment below should be reversed.

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July 14, 2016

APPENDIX

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The Innocence Network's member organizations include: the Actual Innocence Clinic at the University of Texas School of Law; After Innocence; Alaska Innocence Project; Arizona Justice Project; California Innocence Project; Center on Wrongful Convictions; Committee for Public Counsel Services Innocence Program; Connecticut Innocence Project/Post-conviction Unit; Duke Center for Criminal Justice & Professional Responsibility; Exoneration Initiative; George C. Cochran Mississippi Innocence Project; Georgia Innocence Project; Griffith University Innocence Project; Hawai'i Innocence Project; Idaho Innocence Project; Illinois Innocence Project; Innocence & Justice Project at the University of New Mexico School of Law; Innocence Project; Innocence Project Argentina; Innocence Project at UVA School of Law; Innocence Project London; Innocence Project of Minnesota; Innocence Project New Orleans; Innocence Project New Zealand; Innocence Project Northwest; Innocence Project of Florida; Innocence Project of Iowa; Innocence Project of Texas; Irish Innocence Project at Griffith College; Italy Innocence Project; Justicia Reinvindicada – Puerto Rico Innocence Project; Kentucky Innocence Project; Knoops' Innocence Project; Life After Innocence; Loyola Law School Project for the Innocent; Michigan Innocence Clinic; Michigan State Appellate Defender Office – Wrongful Conviction Units; Mid-Atlantic Innocence Project; Midwest Innocence Project; Montana Innocence Project; Nebraska Innocence Project; New England Innocence Project; New York Law School Post-Conviction Innocence Clinic; North Carolina Center on Actual Innocence; Northern California Innocence Project; Office of the Ohio Public Defender, Wrongful

Conviction Project; Ohio Innocence Project; Oklahoma Innocence Project; Oregon Innocence Project; Pennsylvania Innocence Project; Reinvestigation Project; Resurrection After Exoneration; Rocky Mountain Innocence Center; Sellenger Centre Criminal Justice Review Project; Taiwan Association for Innocence; The Association in Defence of the Wrongly Convicted; The Israeli Public Defender; Thurgood Marshall School of Law Innocence Project; University of Baltimore Innocence Project Clinic; University of British Columbia Innocence Project at the Allard School of Law; University of Miami Law Innocence Clinic; Wake Forest University Law School Innocence and Justice Clinic; West Virginia Innocence Project; Western Michigan University Cooley Law School Innocence Project; Wisconsin Innocence Project; Witness to Innocence; and Wrongful Conviction Clinic at Indiana University.